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IN THE

Supreme Court of the United States

October Term, 1971
No. .....

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

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Petitioner, Murray Kaplan, prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, entered in the above entitled case on February 7, 1972.

Opinions Below.

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles is reported in 23 Cal.App.3d Supp. 9, 100 Cal.Rptr. 372. A copy of the opinion appears in Appendix A hereto. The memorandum opinion and judgment of the said Appellate Department of the Superior Court of the State of California for the County of Los Angeles, rendered prior to rehearing and subsequently replaced by the aforesaid opinion and judg-

ment appearing in Appendix A hereto, was rendered on October 27, 1971. The said opinion is not reported and appears in Appendix B hereto. The order dated November 3, 1971, correcting a clerical error in the said judgment of October 27, 1971, is not reported. A copy of the order appears in Appendix C hereto.

Jurisdiction.

The judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles (Appendix A) was entered on February 7, 1972.

The initial judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles (Appendix B) was entered on October 27, 1971, and the order correcting the said judgment (Appendix C) was entered on November 3, 1971. Upon the filing of a due and timely petition for rehearing, an order was made by the said Appellate Department granting the petition for rehearing. The said order was entered on November 10, 1971, and is attached hereto as Appendix D.

Upon rehearing, the Appellate Department rendered its aforesaid judgment, entered on February 7, 1972, which appears as Appendix A hereto. On the same date the Appellate Department entered its order certifying the cause to the Court of Appeal pursuant to Rule 63(a) and (3), California Rules of Court. A copy of the said order certifying the cause to the Court of Appeal is attached hereto as Appendix E. On February 17, 1972, the Court of Appeal of the State of California, Second Appellate District, Division Three, made its order denying transfer of the cause. A copy of the said order appears hereto as Appendix F.

By the aforesaid denial of transfer by the Court of Appeal the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had.[1] See, California Penal Code §1471; California Rules of Court, Rule 62. See also, California Rules of Court, Rules 24(a) and 28(b); *Smith v. California*, 361 U.S. 147, 148, fn. 2; *Virginia Ry. Co. v. Mullins*, 271 U.S. 220, 222.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

1. Whether the book "Suite 69" by I. Smithson is entitled to the protections of the free speech and press provisions of the First and Fourteenth Amendments, and whether California Penal Code §§311 and 311.2, as construed and applied to punish the sale of said book by a retail book seller to an adult who requested and purchased the said book, render the state obscenity statutes unconstitutional, arbitrarily deprive this petitioner of his liberty and property without due process of law, and abridge petitioner's exercise of freedoms of speech and press, all contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

2. Whether California Penal Code §§311 and 311.2, as construed and applied to authorize the judg-

[1]A petition for a writ of habeas corpus was subsequently filed in the Supreme Court of the State of California and denied by that Court without opinion on April 12, 1972, Judge Mosk being of the opinion that the respondent should be ordered to show cause why the relief prayed for in the petition should not be granted. A copy of the order denying the petition for writ of habeas corpus is attached hereto as Appendix G.

ment of conviction of petitioner without any evidence in the record in support of an essential element of the offense, to wit, that the book was utterly without redeeming social importance, and where the only uncontroverted evidence offered by petitioner established by expert testimony that the book had social importance, deprive petitioner of his liberty and property without due process of law and abridge petitioner's exercise of freedoms of speech and press, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

3. Whether California Penal Code §§311 and 311.2, as construed and applied to authorize the judgment of conviction of petitioner herein upon the theory that proof of "pandering" may serve as a substitute for proof by the prosecution that the book is utterly without redeeming social importance, arbitrarily and capriciously deprive petitioner of his liberty and property without due process of law, deny petitioner the equal protection of the laws, and abridge petitioner's exercise of freedoms of speech and press, contrary to the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments, when

(a) No charge of "pandering" was ever made in the complaint; the case was never tried upon such a theory; the jury was never instructed upon such an issue; and the prosecution itself conceded that the doctrine of "pandering" could not be appropriately invoked to affirm the conviction herein;

(b) State statutes which became effective long after the commission of the alleged offense were retroactively applied by the state court to punish the alleged conduct of "pandering", when such

conduct was not punishable under the laws of the State at the time of the commission of the alleged offense, and the highest court of the State had judicially determined that evidence of such conduct could not be used to support a conviction under the general obscenity statute; and

(c) The evidence in the record is barren of any proof of "pandering", as that concept has been interpreted by decisions of the United States Supreme Court.

4. Whether California Penal Code §311 and 311.2, as construed and applied to authorize the judgment of conviction herein, where the standard for judging the alleged obscenity of the book was based upon the community standards of the State, and not upon the standards of the Nation as a whole, deprive petitioner of his liberty and property without due process of law and abridge petitioner's exercise of freedoms of speech and press, contrary to the free speech and press and due process provisions of the first and Fourteenth Amendments.

5. Whether California Penal Code §§311 and 311.2, as construed and applied to authorize the judgment of conviction of petitioner herein, where the sole evidence in the record establishes that petitioner, a retail book seller, sold the book to an adult who requested the book and purchased it, ostensibly for his personal use, and where the prosecution stipulated and conceded that petitioner neither sold the material in his bookstore to minors nor thrust it upon the general public and engaged in no "pandering" of the material, deprive petitioner of his liberty and property without due process of law and abridge petitioner's exercise of free-

doms of speech and press, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments and Article I, Section 10, of the Constitution of the United States and the provisions of California Penal Code §§311 and 311.2 at the time of the commission of the alleged offense, and the provisions of California Penal Code §311(a)(2), which became effective after the commission of the alleged offense, appear in Appendix H hereto.

Statement.

On June 3, 1969, a three-count complaint was filed against petitioner in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, charging violations of California Penal Code §311.2, the state obscenity statute. The trial under the said complaint commenced on January 12, 1971, in the said municipal court before the Honorable David J. Aisenson, a judge of the said court, and a jury. On February 4, 1971, the jury returned verdicts of acquittal as to two of the counts and returned a verdict of guilty solely with respect to the sale by petitioner of a paperback book entitled "Suite 69" to a police officer who had requested it [R.T. 54-55].[2]

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[2]The reference "R.T." is to the Reporter's Transcript on appeal from the judgment of the municipal court to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. Copies of the book "Suite 69" are being lodged with the Court with the filing of this petition for writ of certiorari.

How Federal Questions Are Presented.

A. Prior to trial the petitioner demurred to the complaint upon the ground, among other things, that the California obscenity statute, California Penal Code §§311 and 311.2, on their face and as construed and applied by the said complaint, deprived petitioner of his rights of freedom of speech and press, due process of law, and equal protection of the laws, in violation of the First and Fourteenth Amendments. The demurrer having been overruled, the case proceeded to trial as aforestated.

At the trial it was established that petitioner is the owner of a bookstore located in the City of Los Angeles, County of Los Angeles, State of California. A police officer testified that he purchased the book from petitioner who was then working as a clerk in his bookstore [R.T. 35-59]. It was stipulated by the prosecution that the petitioner neither disseminated the material to minors nor thrust it upon the general public [R.T. 8]. The police officer who purchased the book stated that he had asked petitioner whether he had any good sexy books, and that petitioner had replied that all his books were sexy [R.T. 53]. The police officer asked if petitioner had any good paperback books, and petitioner replied that he was "reading one right now, and it is called 'Suite 69' ".

Aside from the testimony of the aforesaid police officer, the only other testimony offered by the prosecution was by another vice officer who testified over objection [R.T. 122-123, 124, 131] that the material in question appealed to a prurient interest in sex and exceeded customary limits of candor [R.T. 136-139]. The prosecution offered no testimony that the book was

utterly without redeeming social importance. A motion for judgment of acquittal at the end of the prosecution's case was denied [R.T. 249].

On behalf of petitioner, Franklin Laven, an attorney [R.T. 286], testified that the book "Suite 69" does not exceed contemporary limits of candor, does not appeal to a prurient interest in sex, and has social importance [R.T. 326, 337-339]. The court received in evidence by way of judicial notice a book entitled "Adam and Eve", found to be constitutionally protected by the Court in *Hoyt v. Minnesota*, 399 U.S. 524 [R.T. 190, 379-380].

At the close of all the evidence, petitioner again moved for judgment of acquittal, which again was denied [R.T. 485-489]. Following the return of the verdict and the denial of petitioner's motion for a new trial, petitioner was granted probation for a period of three years, on condition that he spend thirty days in the county jail and pay a fine of $1,000.

B. A due and timely appeal was prosecuted by petitioner to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. The questions presented on appeal included the following: (1) That the book "Suite 69" is not obscene and that the state obscenity statute, as construed and applied, violated the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments and the interpretive decisions of the Court and the rulings of other federal and state courts holding comparable books to be entitled to constitutional protection; (2) That the prosecution had failed to present any evidence in support of an essential element of the offense, to wit, that the book was

utterly without redeeming social importance, and that the statute, as construed and applied to authorize the judgment of conviction upon an uncontroverted record showing that the book was not utterly without redeeming social importance, violated the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments; (3) That the statute, as construed and applied to authorize the judgment of conviction based upon a state community standard, and not upon a national standard, violated the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments; and, (4) That the statute, as construed and applied to authorize the judgment of conviction without any evidence to establish that the book appealed to the prurient interest of the actual or intended audience, or went substantially beyond contemporary limits of candor measured by community standards in the Nation as a whole, violated the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments.

C. On October 27, 1971, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles filed a memorandum opinion and judgment, affirming the conviction (Appendix B). With respect to the issue as to the appropriate community standard, the court declined to follow the ruling of the Court in *Jacobellis v. Ohio*, 378 U.S. 184. The court held that "the arguments against a nation-wide standard outweigh those in favor" and that "the state-wide standard applied to all forms of alleged obscenity" (App. B., p. 11).

With respect to the issue of the failure of the prosecution to adduce any evidence that the book was ut-

terly without social importance, and the fact that petitioner had presented uncontroverted expert evidence that the book had social importance, the Appellate Department asserted that the failure of proof was not fatal. The reasoning of the court was that California had enacted new legislation, California Penal Code §311-(a)(2), effective November 10, 1969, some six months after the commission of the alleged offense herein, which provided that in obscenity prosecutions, where the circumstances of production, purchase, sale, dissemination, distribution or publicity indicated that matter was "being commercially exploited by the defendant for the sake of its prurient appeal", such evidence was probative with respect to the nature of the matter and could "justify the conclusion that the matter is utterly without redeeming social importance". Based upon such statute and upon another recent statute, California Penal Code §312.1, which abolished the requirement of expert testimony, the Appellate Department concluded that the conversation between the police officer and petitioner, and the advertisements in the back of the book, amounted to "pandering", and since the jury now had the right to disregard expert opinion, the jury was justified in finding that the prosecution had sustained its burden of proving that the material was utterly lacking in social importance (App. B., pp. 12-14). It should be noted at this point that the complaint against petitioner never made any charge of "pandering"; the case was never tried on a theory of "pandering"; the jury was never instructed that it could consider evidence of "pandering" in reaching a verdict; and, indeed, the prosecution in its brief on rehearing conceded that the concept of pandering could not be constitutionally applied to petitioner. The court

also rejected the contention that the book "Suite 69" is not obscene. Without indicating the distinction between the book herein and comparable books found to be constitutionally protected by this Court, the Appellate Department held that "Suite 69" was obscene and not entitled to constitutional protection.

D. Following the rendition of the aforesaid judgment of October 27, 1971, petitioner filed a due and timely petition for rehearing or, in the alternative, for certification of transfer to the Court of Appeal, pursuant to Rule 63 of the California Rules of Court. It was argued in the first place that the Appellate Department had mistakenly relied upon statutes passed after the commission of the alleged offense in order to justify the affirmance of the conviction upon the doctrine of "pandering" as a substitute for evidence in the record that the book was utterly without redeeming social importance. The petitioner pointed out that California Penal Code §§311(a)(2) and 312.1 did not become effective until November 10, 1969, and that the commission of the offense as charged in the complaint of June 3, 1969, allegedly occurred on May 14, 1969, some six months before the passage of the said statutes. Moreover, the Supreme Court of California had held some two years before that the doctrine of pandering could not be invoked where no such charge was contained in the accusation and where the state legislature had created no such crime. *People v. Noroff*, 67 Cal.2d 791, 433 P.2d 469, 63 Cal.Rptr. 575 (1967).

The attention of the court was called to the fact that the charge of pandering had never appeared in the accusation in the case herein; that the case was never tried on a theory of "pandering"; that the proof did

not establish such "pandering"; and that the jury had never been instructed upon any such theory. It was urged that the court had failed to recognize that there was a complete absence of proof in the record of an essential element of the offense, to wit, that the book was utterly without redeeming social importance. Petitioner urged upon the court that its judgment deprived petitioner of his liberty without due process of law and unconstitutionally subjected him to an *ex post facto* application of the laws.

Petitioner also urged upon the court that the book herein involved was not different in the constitutional sense from the books held to be constitutionally protected by this Court.

E. The aforesaid petition for rehearing was granted by the Appellate Department on November 10, 1971 (Appendix D). In respondent's brief on rehearing, it was conceded that petitioner had not been prosecuted under any theory of pandering; that instructions had not been given to the jury on such issue; and that the prosecution "did not argue this concept at trial and/or on appeal" (Respondent's Brief on Rehearing, p. 2). The prosecution admitted that "the case herein will have to be decided on the book *per se*, plus the evidence pertaining to scienter" (*Ibid.*, p. 3). In short, the prosecution agreed that the court had misapplied the California statutes enacted after the commission of the alleged offense, but argued that the judgment should be affirmed in any event.

On February 7, 1972, the Appellate Department, following rehearing, filed its second opinion and judgment and again affirmed petitioner's conviction (Appendix A). In most respects the court merely reiterated

its prior opinion. The Appellate Department held that the book "Suite 69" is obscene and not entitled to constitutional protection; that the appropriate community standard is that of the State rather than the Nation as a whole, even in a case involving a book intended for nation-wide dissemination; that the question of prurient appeal need not be measured by the book's impact upon its actual and intended audience, even though the prosecution had stipulated that the petitioner neither disseminated the book to minors nor thrust it upon the general public; that the burden of persuasion rested initially with an accused in an obsenity prosecution on the issue of redeeming social value; that although the only evidence in the record on the issue of social value had been produced by petitioner, nevertheless the statute enacted after the commission of the alleged offense (California Penal Code §312.1) authorized the jury to disregard such testimony; and that the prosecution had sufficiently met its burden on the element of social value when evidence of "pandering" appeared in the record. The court held that the concept of pandering enunciated by this Court in *Ginzburg v. United States*, 383 U.S. 463, and reiterated in *Memoirs v. Massachusetts*, 383 U.S. 413, must always have been deemed to be the law in California; that the statutes enacted after the commission of the alleged offense herein merely codified such preexisting law; and that therefore the retroactive application of the statutes did not deprive petitioner of his liberty without due process of law nor his right to a jury trial, did not subject him to any *ex post facto* application of the laws nor subject petitioner to deprivation of his liberty on a charge never made and a theory never tried.

F. On the same date as the rendition of the aforesaid judgment, the Appellate Department filed an order certifying the cause to the Court of Appeal, pursuant to Rule 63(a) and (3), California Rules of Court (Appendix E). The Appellate Department stated in its certification that the transfer "appears necessary to settle important questions of law". The questions so presented were: (1) Is the proper community standard in an obscenity prosecution for sale of a book that of the State of California or a national standard?; (2) Is it proper to place the burden of going forward with evidence as to the redeeming social value of matter which meets the tests of appeal to prurient interest and exceeding customary standards on the defendant?; (3) If the answer to the previous question is in the affirmative, what is the burden of the People in meeting defendant's evidence of redeeming social value?; (4) In California may evidence of the circumstances of production, presentation, sale, dissemination, distribution or publicity constitute sufficient evidence of lack of redeeming social value either under the case of *A Book v. Attorney General (Memoirs)* [1966] 383 U.S. 413, 420 [16 L.Ed.2d 1, 6, 86 S.Ct. 975] or under Penal Code Sec. 311(a)(2)?; and, (5) May Penal Code Sec. 311 (a)(2) be applied in a prosecution for sale or distribution of obscene matter where the sale or distribution occurred before the effective date of such provision?

On February 17, 1972, the Court of Appeal of the State of California, Second Appellate District, Division Three, made its order denying transfer of the cause (Appendix F).

REASONS FOR GRANTING THE WRIT.

1. The book "Suite 69" is not obscene and is entitled to constitutional protection under the First and Fourteenth Amendments to the Constitution and the interpretive decisions of this Court. The book contains no illustrations and its language plainly does not exceed contemporary community standards and the limits of tolerance which the community as a whole today gives to writing about sex and sex relations. The frankness with which sex and sex relations are dealt with at the present time is evident in all media of public expression, in the kind of language used and subjects discussed in every area of society, in theaters, films, books, advertisements, dress, and in many other ways familiar to the community. The book does not appeal to a shameful or morbid interest in sex and is not utterly without social importance. Moreover, the uncontroverted evidence in the record establishes that the book has social importance. Measured by the constitutional standards for judging obscenity, as enunciated and applied by this Court, the book is not obscene and is entitled to the protection of the First Amendment.

Language equally explicit and, indeed, even more candid than the language contained in the book herein has been held to be entitled to constitutional protection in decisions of this Court and the lower courts since *Roth* and until the most recent term of the Court. Explicit descriptions of sex relations in books, periodicals and other media of communication are plainly tolerated by the community generally.

In the light of the requirements of the First and Fourteenth Amendments and the interpretive decisions of this Court with respect to books indistinguishable in

content from the book here involved, it is submitted that the judgment of conviction here, imposing fine and imprisonment upon petitioner, cannot stand consistent with the guarantees of the fundamental law. This Court has emphasized again and again that "sex and obscenity are not synonymous". *Roth v. United States*, 354 U.S. at 487. Under any conceivable constitutional standard for judging obscenity, the book herein is not obscene and is entitled to constitutional protection. See, *Childs v. Oregon*, 401 U.S. 1006 ("Lesbian Roommate"); *Walker v. Ohio*, 398 U.S. 434 ("Lurid Sinner", "Sin Crop", "Sands of Shame"); *Hoyt v. Minnesota*, 399 U.S. 524 ("The Way of a Man With a Maid", "Adam and Eve", "Business as Usual", "Lady Susan's Cruel Lover", "True Love Stories of Growing Up"); *Quantity of Copies of Books v. Kansas*, 378 U.S. 205 ("Sin Hooked", "Bayou Sinners", "Lust Hungry", "Shame Shop", "Fleshpot", "Sinners Seance", "Passion Priestess", "Penthouse Pagans", "Shame Market", "Sin Warden", "Flesh Avenger"); *Aday v. United States*, 388 U.S. 447 ("Sex Life of a Cop"); *Books, Inc. v. United States*, 388 U.S. 449 ("Lust Job"); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 ("Sin Whisper"); *Keney v. New York*, 388 U.S. 440 ("Sin Servant", "Lust School", "Lust Web"); *Mazes v. Ohio*, 388 U.S. 453 ("Orgy Club"); *Friedman v. New York*, 388 U.S. 441 "Bondage Boarding School", "English Spanking School", "Bound and Spanked", "Sweeter Gwen", "Traveling Saleslady Gets Spanked", "Bound to Please", "Bizarre Summer Rivalry", "Heatwave", "Escape Into Bondage"); *Sheperd v. New York*, 388 U.S. 444 ("Promenade Bondage", "Spanking Nurses," "Spanking Sisters", "Bondage"); *Avansino v. New York*, 388 U.S. 446 ("Promenade Bondage, Vol. 4");

Redrup v. New York, 386 U.S. 767 ("Lust Pool", "Shame Agent"); *Memoirs v. Massachusetts*, 383 U.S. 413 ("Fanny Hill"); *Grove Press, Inc. v. Gerstein*, 378 U.S. 577 ("Tropic of Cancer"); *Tralins v. Gerstein*, 378 U.S. 576 ("Pleasure Was My Business"). See also, *Grove Press, Inc. v. Christenberry*, 276 F.2d 433 (2 Cir. 1960), affg. 175 F.Supp. 488 (D.C. N.Y. 1959) ("Lady Chatterley's Lover"); *Haldeman v. United States*, 340 F.2d 59 (10 Cir. 1965); *Grant v. United States*, 380 F.2d 748 (9 Cir. 1967); *Luros v. United States*, 389 F.2d 200 (8 Cir. 1968) ("Lesbian Sin Song", "Two Women in Love", "Pleasure House", "Lesbian Alley", "The Three Way Apartment," "The Affairs of Gloria").

2. The record is barren of any evidence to establish that the book herein is utterly without redeeming social importance. The only evidence in the record, uncontroverted, is that the book does have social importance. The conviction of petitioner, therefore, for a violation of the state obscenity statutes rests upon a record devoid of evidence to support petitioner's alleged guilt and constitutes, it is submitted, a plain denial of due process.

Where the "transcendent value of speech" is involved, due process requires "that the State bear the burden of persuasion to show that the [accused] engaged in criminal speech". *Speiser v. Randall*, 357 U.S. 513, 526. In *Memoirs v. Massachusetts*, 383 U.S. 415, this Court emphasized the importance of the "three federal constitutional criteria" for judging the alleged obscenity of material (383 U.S. at 419). With respect to the *Roth* definition, the Court also stressed the following: "Under this definition, as elaborated in subsequent cases, three elements must coalesce: *it must be established*

that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." (383 U.S. at 418) (Emphasis added).

It follows from the aforesaid principles that an essential element of the offense of obscenity demanded by the Constitution is evidence that material involved is utterly without redeeming social importance. It follows also that the prosecution in all such cases is constitutionally required to plead and prove all the essential elements of the offense. It is contrary to law and the Constitution to judicially improvise a presumption that material which appeals to prurient interest and exceeds customary limits of candor is necessarily utterly without redeeming social importance. Such an irrational presumption violates due process and undermines the presumption of innocence. In *United States v. Vuitch*, 402 U.S. 62, this Court held that under a law which prohibited abortion unless "necessary for the preservation of the mother's life or health", the burden was on the prosecution to *plead and prove* that abortion was not necessary for such purposes.

Moreover, it is inadmissible, it is submitted, to permit the prosecution to rely solely upon the material itself with respect to the issue of socially redeeming importance. It cannot be assumed that triers of the facts are necessarily familiar with what has literary, artistic, historical, psychological, educational, entertaining, or other social value and importance. To sanction convictions without evidence in support of every essential element of the offense in an obscenity prosecution is to

encourage the trier of facts to condemn as obscene material deemed subjectively to be without value to the particular juror or judge.

The effect of the ruling of the Appellate Department is to permit a judgment of conviction in an obscenity prosecution without the slightest proof, directly or indirectly, to establish an essential element of the offense, to wit, the utter lack of social value of the material. Conviction of a crime without any evidence in the record to support the accused's guilt not only constitutes a denial of due process, but an abridgment of the exercise of freedoms of speech and press protected by the First and Fourteenth Amendments. *Garner v. Louisiana*, 368 U.S. 157, 173-174; *Thompson v. City of Louisville*, 362 U.S. 199, 204-206.

3. The state court has upheld the void conviction of petitioner here by devising a concept of "pandering" which has no basis in fact or in law in the case herein, and which results in the deprivation of petitioner's constitutional rights.

In the first place, it should be emphasized again that no charge of "pandering" was ever made in the complaint; the case was never tried upon such a theory; the jury was never instructed upon such an issue; and the prosecution itself conceded before the Appellate Department that the doctrine of pandering could not be appropriately invoked to affirm the conviction herein. This Court has emphasized again and again that conviction upon a charge not made is the sheerest denial of due process of law. *DeJonge v. Oregon*, 299 U.S. 353, 362. This Court has also held that conviction of a charge on which an accused was never tried is as much a violation of due process as it is to convict him

upon a charge that was never made. *Cole v. Arkansas,* 333 U.S. 196, 201. At this very term of Court a judgment of conviction was reversed where a statute, as construed and applied, failed to give the accused fair notice that certain conduct was proscribed. *Rabe v. Washington,* 92 S.Ct. 993.

Moreover, without conceding the validity of the state statutes which became effective long after the commission of the alleged offense by the petitioner, it is plain that the attempt to apply such statute to petitioner in order to support the conviction here runs counter to fundamental principles embodied in the Constitution. It has long been held that a statute, on its face and as construed and applied, comes within the constitutional prohibition of *ex post facto* laws when, by its necessary operation and " 'in its relation to the offense, or its consequences, alters the situation of the accused, to his disadvantage' ". *Thompson v. Utah,* 170 U.S. 343. Indeed, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I §10, of the Constitution forbids". *Bouie v. City of Columbia,* 378 U.S. 347, 353. What the court below has held is that petitioner could be convicted on the basis of alleged conduct which concededly was not proscribed at the time of the commission of the alleged offense, and which the highest court of the State had held could not be used to support a conviction under the general obscenity statute. At the time of the commission of the alleged offense, the petitioner here had "no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction". *Bouie v. City of Columbia,* 378 U.S. at 352.

Finally, wholly apart from the fact that no charge of "pandering" was ever made or tried before the jury, and the retrospective action of the court below violates fundamental principles of due process and guarantees against *ex post facto* laws, there was no proof of "pandering" in the case herein. Petitioner's statement to the police officer at the time of purchase, that he had "sexy" books, and the advertisements in the back of the book, taken separately or together, could hardly be deemed sufficient to support a finding of "pandering" as this Court has interpreted the concept. See, *Redrup v. New York*, 386 U.S. 767; *Aday v. United States*, 388 U.S. 447, reversing *sub nom. United States v. West Coast News Co.*, 357 F.2d 855 (6 Cir. 1966); *Books, Inc. v. United States*, 388 U.S. 449, reversing 358 F.2d 935 (1 Cir. 1966); *Childs v. Oregon*, 401 U.S. 1006; *Bloss v. Dykema*, 398 U.S. 278; *Walker v. Ohio*, 398 U.S. 524; *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50; *Potomac News Co. v. United States*, 389 U.S. 47. See also, *United States v. Baranov*, 418 F.2d 1051 (9 Cir. 1969); *Spinar and Germain v. United States*, 440 F.2d 1241 (8 Cir. 1971); *Luros v. United States*, 389 F.2d 200 (8 Cir. 1968).

4. The court below declined to follow the ruling of the Court in *Jacobellis v. Ohio*, 378 U.S. 184. The Appellate Department held, in effect, that there is greater latitude for state action under the word "liberty" under the Fourteenth Amendment than is allowed to Congress by the language of the First Amendment. The adoption of the community standards of a State, as opposed to the standards of the Nation as a whole, can only result in deterring expression and undermining the guarantees contained in the First Amendment, subsumed

into the due process clause of the Fourteenth Amendment as a limitation upon state action. The constitutional limits of free expression in the Nation should not, it is submitted, vary with state lines, a principle which is of transcendent importance to the security of the Nation in this contemporary era.

5. The book herein involved was sold to an adult who requested the book and purchased it ostensibly for his personal use. It was stipulated by the prosecution that petitioner neither sold the material in his bookstore to minors nor did he thrust it upon the general public. The prosecution also conceded that no pandering was involved in the case and, indeed, there was no evidence with respect thereto. Thus, the State herein showed no special circumstance that would justify the prosecution of petitioner in the face of the decision by this Court in *Stanley v. Georgia*, 394 U.S. 557, and petitioner's conduct was therefore protected, it is submitted, by the provisions of the First and Fourteenth Amendments. See, *United States v. Dellapia*, 433 F.2d 1252 (2 Cir. 1970).

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Petitioner.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Opinion and Judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Murray Kaplan, Defendant and Appellant. Superior Court No. CR A 10391 Municipal Court of the Los Angeles Judicial District No. 337520.

MEMORANDUM OPINION AND JUDGMENT

Appeal by defendant from judgment of the Municipal Court, David J. Aisenson, Judge.

Judgment affirmed.

For Appellant—Stanley Fleishman, Inc., by David M. Brown.

For Respondent—Roger Arnebergh, City Attorney by Madeleine Flier, Deputy City Attorney.

Appellant states twenty-one grounds for appeal, many of which are overlapping and some (e.g., V, VI, XVIII, XX, and XXI) so vague and general as to be useless in pointing out specific grounds for reversal. In his brief he gets down to three which we may summarize as follows: (1) The book "Suite 69" is not obscene; (2) The prosecution failed to present any evidence that the book is utterly without redeeming social importance, whereas, defendant presented expert testimony that it did have some social importance; (3) That the trial court applied the wrong "community standard."

We will discuss these issues in reverse. As to community standard, appellant contends the only proper

community is the nation. For this he relies upon *Jacobellis v. Ohio* [1964] 378 U.S. 184 [12 L.Ed.2d 793; 84 S.Ct. 1676]. The case does not so hold. Only two judges, Brennan and Goldberg, joined in the opinion requiring a national standard. Two others, Chief Justice Warren and Justice Clark, expressly repudiate the idea of a national standard and Justice Harlan's position that a state has greater latitude in determining what may be banned on the score of obscenity than is so with the Federal government seems meaningless if the standard to be applied is a national one. The other four justices expressed no opinion one way or the other on the question of a national standard.[1] While the Supreme Court of California in *In re Giannini* [1968] 69 Cal.2d 563 [72 Cal.Rptr. 655, 466 P.2d 535], may have left the question open as to books and motion pictures, its holding that the standard is the state has been applied to movies[2] by the Court of Appeal in *Monica Theater v. Municipal Court*[3] [1970] 9 Cal.App. 3d 1 [88 Cal.Rptr. 71] and by this court in *People v. Cimber* [1969] Cr. A.8531.[4] As we feel that the arguments against a nationwide standard outweigh those in favor, we adhere to our prior ruling. We feel the state-wide standard applies to all forms of alleged obscenity.

---

[1]However, Justice White appears to take a position similar to that of Justice Harlan in the last paragraph of his dissenting opinion in: *A Book v. Attorney General, infra.*

[2]*Jacobellis v. Ohio* involved a motion picture and the appellant herein apparently concedes that the standard should be the same whether a book or a motion picture is involved.

[3]See fn. 4, 9 Cal.App. 3d p. 6, and dissenting opinion of Justice Aiso, p. 21.

[4]Hearing by Court of Appeal den. Nov. 4, 1969 and again on Nov. 26, 1969.

Defendant also attacks the standard applied on the ground that the appeal must be to the prurient interest of its proposed audience, to-wit, consenting adults. This contention is answered against his position in *People v. Luros* [1971] 4 Cal.3d 84 [92 Cal.Rptr. 833, 480 P. 2d 633].

Appellant's second point is that the People introduced no evidence to meet his expert's opinion that the book had social importance. The People counter this by claiming that the jury was not required to accept this opinion but could reject the expert's testimony and hence defendant had not met his burden under *People v. Newton* ([1970] 9 Cal.App.3d Supp. 24 [88 Cal.Rptr. 343]). The People misconceive our holding in *Newton.*

All we held in that case was that once the People had presented proof of appeal to prurient interest and overstepping the customary limits of candor, the *burden of going forward* with some evidence on the issue of redeeming social value was on the defendant. The reason for this rule is that where prurient interest is predominant and the customary limits of candor are exceeded, it is difficult to conceive wherein social value might lie. Rather then require the People to start in this void, the defendant must make the start by producing some evidence of social value.[4] Only then do the Peo-

---

[4]The Supreme Court appears to have tacitly adopted this position in *In re Giannini* [1968] 69 Cal.2d 563 [72 Cal.Rptr. 655, 446 P.2d 535]. The opinion refers to no evidence of the question of redeeming social value produced by either party in the trial court. In footnote 5 on p. 573 the court says: "Petitioners do not so much as claim that their convictions should be set aside on the ground of the 'redeeming social value' of Iser's dance. Thus we do not reach the problem of whether the dance was 'utterly without redeeming social value. . . .'"

ple know in what area they must proceed. But, as in all cases where only the burden of going forward is placed upon a party once he has done so by producing some evidence, there can be no weighing process until the party having the burden of persuasion has produced something on his own behalf to be weighed. It is then not enough for the party having the burden of persuasion to simply destroy his adversary's evidence for that would only again balance the scales, whereas, the person having the burden of persuasion must tip them. (*People v. Holden* [1972] Cr. A.10754.)

However, while it is true the People introduced no expert evidence on this point, that does not settle the issue. While reversing the state court's holding that "John Cleland's Memoirs of a Woman of Pleasure" was obscene, the Supreme Court of the United States said:

> "It does not necessarily follow from this reversal that a determination that *Memoirs* is obscene in the constitutional sense would be improper under all circumstances. On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. It is not that in such a setting the social value test is relaxed so as to dispense with the requirement that a book be *utterly* devoid of social value, but

rather that, as we elaborate in *Ginzburg v. United States*, 383 U.S. 463, 470-473, 16 L.Ed.2d 31, 37-40, 86 S.Ct. 942, where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value."

A Book v. Attorney General [1966] 383 U.S. 413, 420 [16 L.Ed.2d 1, at p. 6, 86 S.Ct. 975].

Is this statement good law in California? Relying upon *People v. Noroff* [1967] 67 Cal.2d 791 [63 Cal. Rptr. 575, 433 P.2d 479], and *People v. Rosakos* [1968] 268 Cal.App.2d 497 [74 Cal.Rptr. 34], appellant contends that it is not. We do not feel these opinions require such a holding. In both of these cases the reviewing court upon its own examination of the alleged obscene material held that as a matter of law applying contemporary community standards, the dominant theme of the material taken as a whole did not appeal to prurient interest. Where the material is so found to lack one of the elements of obscenity as set forth in *Roth v. United States* [1957] 354 U.S. 476 [1 L.Ed.2d 1498, 77 S.Ct. 1304], each court held that this element could not be supplied by pandering. "The seller's statement certainly cannot make that which is not obscene, obscene" (*People v. Rosakos*, p. 500). It is in this light that the court's statement in *Noroff* that "the State Legislature has created no such crime [pandering]" must be viewed [see fn. 3, 67 Cal. 2d p. 793].

But supplying an element missing as a matter of law is one thing. The problem of what type of evidence may be used to prove a required element in a doubt-

ful case is another. Here, there is no contention that the People can prevail without carrying their burden of persuasion on the issue of "no redeeming social value." The jury was adequately instructed on this requirement (plaintiff's instructions 7, 7a and defendant's instructions 23 and 24). We feel that what *A Book* is saying is only that evidence that the book was commercially exploited for the sake of prurient appeal to the exclusion of all other values may be deemed an admission by the defendant that the book is devoid of redeeming social value. Like any other admission by a defendant, it may be received in evidence and may support a finding to the same effect. It is to be remembered that in *In re Giannini* (*supra* fn. 5) the California Supreme Court recognized that there was a distinction between the type of evidence required to prove the elements of "appeal to prurient interest" and "exceeding the customary limits of candor in the community" and that required on the issue of "redeeming social value."[6] Even if *Noroff* and *Rosakos* are deemed authority for the proposition that pandering can never be used on the question of appeal to prurient interest, that fact does not preclude following *A Book v. Attorney General* on the issue of redeeming social value. The California Legislature by adopting Penal Code § 311(a)(2), which reads as follows:

> "In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of

[6]Expert testimony was held necessary to establish the former two elements but not the latter.

the matter and can justify the conclusion that the matter is utterly without redeeming social importance"

simply made it clear that the rule announced by the United States Supreme Court in *A Book* applies in California. As there was, in our opinion, no holding to the contrary in this state, the law is not *ex post facto* as to sales made before its adoption.

In light of the evidence of the circumstances surrounding the sale (R.T. p. 53, line 27 to p. 55, line 20) and the advertising found following the end of the "story" at p. 180 in the book itself, and remembering the right of the jury to disregard expert opinion if the jurors find it to be unreasonable (Penal Code § 1127[b]), we feel the jury was amply justified in this case in finding that the state had sustained its burden of proving that the material was utterly lacking in social importance. Making our own independent examination of the record as required by *Zeitlin v. Arnebergh* [1963] 59 Cal.2d 901 [31 Cal.Rptr. 800, 383 P.2d 152], we make the same finding.

Relying on cases like *People v. St. Martin* [1970] 1 Cal.3d 524 [83 Cal.Rptr. 166, 463 P.2d 390], appellant contends that as the jury was not instructed on pandering that concept cannot be considered in support of their verdict. *People v. St. Martin* involved a failure to instruct on a possible defense (involving reduction of degree). No such omission is involved herein. As pointed out above, the jury was properly instructed as to the required element of obscenity that the material be utterly without redeeming social value. They were also properly instructed on circumstantial evidence. Beyond this, we know of no requirement

that the trial court must *sua sponte* instruct on what evidence may be considered to prove a particular issue.

We come now to the contention that the book "Suite 69" is not obscene. Part of appellant's argument boils down to a contention that no book can ever be considered obscene. This cannot be true in California, for if it were, cases life *People v. Luros, supra,* and *People v. Chapman* [1971] 17 Cal.App.3d 865 [95 Cal. Rptr. 242] would be meaningless. Hence, a line must be drawn somewhere. Where a sufficient foundation for its introduction has been laid, comparable matter held not obscene by the Supreme Court of the United States or of this state may be helpful in drawing this line; but, unless the comparable material equals or exceeds the subject book on all three elements of obscenity, to-wit: appeal to prurient interest; excess over accepted standards; and lack of evidence of redeeming social importance, such comparable material does not require a finding of non-obscenity as a matter of law. Having examined the subject book in comparison with defendant's chief alleged comparable book "Adam and Eve," we feel there are sufficient distinctions so that even if the latter is not obscene as a matter of law, such fact does not require such a finding as to the subject book.

The jury impliedly found the subject book went beyond the permissible limits. Upon our independent review we agree with the People's experts. "Suite 69" appeals to a prurient interest in sex and is beyond the customary limits of candor within the State of Cali-

fornia. We also find, as did the jury, that there is no redeeming social importance.

Judgment affirmed.

Dated Feb. 7, 1972.

Whyte
Presiding Judge

We concur:

KATZ
Judge

ZACK
Judge

CERTIFICATION FOR PUBLICATION

We certify that the foregoing opinion qualifies for publication in the official reports under California Rules of Court, Rule 976(b) in that it establishes a new rule of law and also involves issues of continuing public interest.

Dated Feb. 7, 1972.

WHYTE
Presiding Judge

KATZ
Judge

ZACK
Judge

APPENDIX B.

Memorandum Opinion and Judgment of the Appellate Department Rendered Prior to Rehearing, and Subsequently Replaced by Opinion and Judgment (Appendix A).

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Murray Kaplan, Defendant and Appellant. Superior Court No. CR. A 10391 Municipal Court of the Los Angeles Judicial District No. 337520.

MEMORANDUM OPINION AND JUDGMENT

Appeal by defendant from judgment of the Municipal Court, David J. Aisenson, Judge.

Judgment affirmed.

For Appellant—Stanley Fleishman, Inc., by David M. Brown.

For Respondent—Roger Arnebergh, City Attorney by Madeleine Flier, Deputy City Attorney.

Appellant states twenty-one grounds for appeal, many of which are overlapping and some (e.g., V, VI, XVIII, XX, and XXI) so vague and general as to be useless in pointing out specific grounds for reversal. In his brief he gets down to three which we may summarize as follows: (1) The book "Suite 69" is not obscene; (2) The prosecution failed to present any evidence that the book is utterly without redeeming social importance, whereas, defendant presented expert testimony that it did have some social importance; (3) That the trial court applied the wrong "community standard."

We will discuss these issues in reverse. As to community standard, appellant contends the only proper community is the nation. For this he relies upon *Jacobellis v. Ohio* [1964] 378 U.S. 184 [12 L.Ed.2d 793; 84 S.Ct. 1676]. The case does not so hold. Only two judges, Brennan and Goldberg, joined in the opinion requiring a national standard. Two others, Chief Justice Warren and Justice Clark, expressly repudiate the idea of a national standard and Justice Harlan's position that a state has greater latitude in determining what may be banned on the score of obscenity than is so with the Federal government seems meaningless if the standard to be applied is a national one. The other four justices expressed no opinion one way or the other on the question of a national standard.[1] While the Supreme Court of California in *In re Giannini* [1968] 69 Cal.2d 563 [72 Cal.Rptr. 655, 466 P.2d 535], may have left the question open as to books and motion pictures, its holding that the standard is the state has been applied to movies[2] by the Court of Appeal in *Monica Theater v. Municipal Court*[3] [1970] 9 Cal. App.3d 1 [88 Cal.Rptr. 71] and by this court in *People v. Cimber* [1969] Cr.A. 8531.[4] As we feel that the arguments against a nationwide standard outweigh those in favor, we adhere to our prior ruling. We feel the state-wide standard applies to all forms of alleged obscenity.

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[1]However, Justice White appears to take a position similar to that of Justice Harlan in the last paragraph of his dissenting opinion in: *A Book v. Attorney General, infra.*

[2]*Jacobellis v. Ohio* involved a motion picture and the appellant herein apparently concedes that the standard should be the same whether a book or a motion picture is involved.

[3]See f.n. 4, 9 Cal.App.3d p. 6, and dissenting opinion of Justice Aiso, p. 21.

[4]Hearing by Court of Appeal den. Nov. 4, 1969 and again on Nov. 26, 1969.

Defendant's second attack on the standard applied, to-wit, that the appeal must be to the prurient interest of its proposed audience, to-wit, consenting adults, is answered against his position in *People v. Luros* [1971] (4 Cal.3d 84; 92 Cal.Rptr. 833) 480 P.2d 633.

Appellant's second point is that the People introduced no evidence to meet his expert's opinion that the book had social importance. While it is true the People introduced no expert evidence on this point, that does not settle the issue. While reversing the state court's holding that "John Cleland's Memoirs of a Woman of Pleasure" was obscene, the Supreme Court of the United States said:

> "It does not necessarily follow from this reversal that a determination that *Memoirs* is obscene in the constitutional sense would be improper under all circumstances. On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. It is not that in such a setting the social value test is relaxed so as to dispense with the requirement that a book be *utterly* devoid of social value, but rather that,

as we elaborate in *Ginzburg v. United States*, 383 U.S. 463, 470-473, 16 L.Ed.2d 31, 37-40, 86 S.Ct. 942, where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value."

A Book v. Attorney General [1966] 383 U.S. 413, 420 [16 L.Ed.2d 1, at p. 6, 86 S.Ct. 975].

The California State Legislature has now adopted a similar position in Penal Code §311(a)(2) which reads as follows:

"In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance."

The Legislature has also abolished the requirement of expert testimony (Penal Code §312.1). In light of the evidence of the circumstances surrounding the sale (Reporter's Transcript p. 53, line 27 to p. 55, line 20) and the advertising found following the end of the "story" at p. 180 in the book itself, and remembering the right of the jury to disregard expert opinion if the jurors find it to be unreasonable (Penal Code 1127 (b), we feel the jury was amply justified in this case in finding that the state had sustained its burden of proving that the material was utterly lacking in social

importance. Making our own independent examination of the record as required by *Zeitlin v. Arneberg* [1963] 59 Cal.2d 901 [31 Cal.Rptr. 800, 383 P.2d 152, we make the same finding.

We come now to the contention that the book "Suite 69" is not obscene. Part of appellant's argument boils down to a contention that no book can ever be considered obscene. This cannot be true in California, for if it were, cases like *People v. Luros, supra,* and *People v. Chapman* [1971] 17 Cal.App.3d 865 [....Cal.Rptr. ....] would be meaningless. Hence, a line must be drawn somewhere where a sufficient foundation for its introduction has been laid, comparable matter held not obscene by the Supreme Court of the United States or of this state may be helpful in drawing this line; but, unless the comparable material equals or exceeds the subject book on all three elements of obscenity, to wit: appeal to prurient interest; excess over accepted standards; and lack of evidence of redeeming social importance, such comparable material does require a finding of non-obscenity as a matter of law. Having examined the subject book in comparison with defendant's chief alleged comparable book "Adam and Eve," we feel there are sufficient distinctions so that even if the latter is not obscene as a matter of law, such fact does not require such a finding as to the subject book.

The jury impliedly found the subject book went beyond the permissible limits. Upon our independent review we agree with the People's experts. "Suite 69" appeals to a prurient interest in sex and is beyond

the customary limits of candor within the State of California. We also find, as did the jury, that there is no redeeming social importance.

Judgment affirmed.

Dated Oct. 27, 1971.

WHYTE
Presiding Judge

We concur:

WONG
Judge

SMITH
Judge

APPENDIX C.

Order of Appellate Department Correcting Judgment of Court.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Murray Kaplan, Defendant and Appellant. Superior Court No. CR. A. 10391 Municipal Court of the Los Angeles Judicial District No. 337520.

ORDER CORRECTING JUDGMENT OF COURT

It appearing that by clerical error the judgment of this court in the above-entitled case, rendered October 27, 1971, omitted the word "not" from line 3, page 5,

IT IS NOW ORDERED that said judgment of this court be amended nunc pro tunc as of October 27, 1971, so that line 3, page 5 of said judgment shall read:

"redeeming social importance, such comparable material does not require a"

Dated Nov. 3, 1971.

BY THE COURT.

WHYTE
Presiding Judge

WONG
Judge

APPENDIX D.

Order of Appellate Department Granting Petition for Rehearing.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Murray Kaplan, Defendant and Appellant. Superior Court No. CR. A 10391 Municipal Court of the Los Angeles Judicial District No. 337520.

ORDER GRANTING PETITION FOR REHEARING

Appellant's petition for rehearing having been fully considered, the same is hereby granted. The cause is reset on this court's calendar for December 30, 1971 at 9:30 a.m. for the sole purpose of further considering the question whether Penal Code §311(a)(2) and 312.1 may constitutionally be applied in a case where the offense occurred before the effective date of said statutes and the trial was held after said effective date.

Briefs limited to this sole issue may be filed by the parties as follows:

Appellant's opening brief by November 26, 1971;
Respondent's brief by December 7, 1971;
Appellant's reply brief by December 14, 1971.
Dated: Nov. 10, 1971.

BY THE COURT.
WHYTE
Presiding Judge
WONG
Judge
ZACK
Judge

APPENDIX E.

Order of Appellate Department Certifying Cause to Court of Appeal.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Murray Kaplan, Defendant and Appellant. Superior Court No. CR A 10391 Municipal Court of the Los Angeles Judicial District No. 337520.

ORDER CERTIFYING CAUSE TO COURT OF APPEAL

Pursuant to Rule 63(a) and (c), California Rules of Court, upon this court's own motion, we certify that the transfer of the above-entitled cause to the Court of Appeal appears necessary to settle important questions of law.

The questions so presented are:

(1) Is the proper community standard in an obscenity prosecution for sale of a book that of the State of California or a national standard?

(2) Is it proper to place the burden of going forward with evidence as to the redeeming social value of matter which meets the tests of appeal to prurient interest and exceeding customary standards on the defendant?

(3) If the answer to the previous question is in the affirmative, what is the burden of the People in meeting defendant's evidence of redeeming social value?

(4) In California may evidence of the circumstances of production, presentation, sale, dissemina-

tion, distribution or publicity constitute sufficient evidence of lack of redeeming social value either under the case of *A Book v. Attorney General (Memoirs)* [1966] 383 U.S. 413, 420 [16 L.Ed. 2d 1, 6, 86 S.Ct. 975] or under Penal Code Sec. 311(a)(2)?

(5) May Penal Code Sec. 311(a)(2) be applied in a prosecution for sale or distribution of obscene matter where the sale or distribution occurred before the effective date of such provision?

In our opinion, a copy of which is attached hereto, we answered question (1) that the community was the State of California. Questions (2), (4) and (5) we answered in the affirmative. As to question (3), we held it was not sufficient for the People to merely overcome the defendant's evidence but that they must then produce affirmative evidence of lack of redeeming social value.

Dated Feb. 7, 1972.

BY THE COURT.
WHYTE
Presiding Judge
KATZ
Judge
ZACK
Judge

APPENDIX F.

Order of Court of Appeal Denying Transfer.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

People of the State of California, Plaintiff and Respondent, v. Murray Kaplan, Defendant and Appellant. 2d Crim. No. 21346 Sup. Ct. No. CR A 10391. Municipal Court of the Los Angeles Judicial District No. 337520.

ORDER

The record on transfer in the above entitled cause having been filed in this court on February 8, 1972, pursuant to certification made by the Appellate Department of the Superior Court of Los Angeles County, and this court having considered the matter of whether such cause should be transferred to this court for hearing and decision,

NOW, THEREFORE, IT IS HEREBY ORDERED that such transfer be and it hereby is denied.

Filed: Feb. 17, 1972.

FORD, *P. J.*
SCHWEITZER, *J.*
ALLPORT, *J.*

APPENDIX G.

Order Denying Writ of Habeas Corpus.

In the Supreme Court of the State of California in Bank. Criminal No. 16214.

In re Kaplan on Habeas Corpus.

Filed: April 12, 1972.

Petition for writ of habeas corpus DENIED.

Mosk, J., is of the opinion that the respondent should be ordered to show cause why the relief prayed for should not be granted.

[Seal]

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 12th day of April A.D. 1972.

/s/ By R. C. Matteoli
Deputy Clerk
/s/ Wright
Chief Justice

APPENDIX H.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

3. The pertinent provisions of Article I, Section 10, of the United States Constitution are:

> "No State shall . . . pass any . . . ex post facto laws, . . ."

4. California Penal Code §311, at the time of the commission of the alleged offense, provided as follows:

> "As used in this chapter:
>
> (a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.
>
> (b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or

any other articles, equipment, machines or materials.

(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

(d) 'Distribute' means to transfer possession of, whether with or without consideration.

(e) 'Knowingly' means having knowledge that the matter is obscene. (Added Stats. 1961, c.2147, p. 4427, §5)."

5. The pertinent provisions of California Penal Code §311.2, at the time of the commission of the alleged offense, provided as follows:

"(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. * * *"

6. California Penal Code §311(a)(2), which became effective after the commission of the alleged offense, provides as follows:

"In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance."